IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SUMMIT METALS, INC.,	:	
Plaintiff,	:	Civil Action No. 00-387-JJF
v.	:	
RICHARD E. GRAY, et al.,	:	
Defendants.	:	

Todd Schiltz, Esquire of WOLF BLOCK SCHORR & SOLIS-COHEN, LLP, Wilmington, Delaware.
Of Counsel: H. Adam Prussin, Esquire of POMERANTZ, HAUDEK, BLOCK, GROSSMAN & GROSS, New York, New York. Paul J. Brenman, Esquire of WOLF BLOCK SCHORR & SOLIS-COHEN, Philadelphia, Pennsylvania.
Attorneys for Official Committee of Unsecured Creditors of Summit Metals, Inc.

Henry A. Heiman, Esquire of HEIMAN, ABER, GOLDLUST, & BAKER, Wilmington, Delaware.
Attorney for Defendants.

MEMORANDUM OPINION

August 20, 2002
Wilmington, Delaware.

FARNAN, District Judge.

Presently before the Court is Plaintiff's Motion For Partial Summary Judgment (D.I. 2, Adversary Proceeding No. 99-557 D.I. 4)[1] on its First Cause of Action. By its First Cause of Action, Plaintiff Summit Metals, Inc. ("Summit Metals") seeks to rescind a transfer by The Chariot Group, Inc., a predecessor to Summit Metals, of its interest in its operating subsidiary, Energy Savings Products, Inc., to Defendant HomeStar Acquisition, Inc. ("the ESP Transfer"). For the reasons discussed, the motion will be denied.

FACTS

1. Summit Metals is a Delaware Corporation which filed a voluntary Chapter 11 Bankruptcy Petition on December 30, 1998.

2. The instant litigation was commenced by the Official Committee of Unsecured Creditors on October 29, 1999. (D.I. 1).

3. Summit Metals seeks to rescind the ESP Transfer, against Defendants Richard E. Gray, Energy Savings Products, Inc., B.F. Rich Co, Inc., Harcar, Inc., Hallowell Industries, Inc., CP Plastics, Inc., and CHH Holdings, Ltd.

4. Defendant Richard Gray ("Gray") was the chairman, sole director, and CEO of Summit Metals at certain times prior to August 8, 1995. (D.I. 28 at 2).

[1]All documents relevant to the instant motion are contained within the Designated Withdrawal Record, Docket Items 2-6. However, for ease of reference to specific documents, the Court will refer to the Docket Item as filed in the adversary proceeding.

5. Defendant CHH Holdings, Ltd. ("Holdings") is a Delaware corporation which is solely owned by Gray. (D.I. 1 at 2, D.I. 28 at 2).

6. Defendant CP Plastics, Inc. ("Plastics") is a Delaware corporation. (D.I. 1 at 2, D.I. 28 at 2). Gray was the Chairman of the Board for Plastics. (D.I. 47 at 10). Plastics was the majority shareholder of record of The Chariot Group, Inc. ("Chariot"). (D.I. 28 at 2).

7. Defendant Energy Savings Products, Inc. is a Delaware corporation. (D.I. 53 at 2). Prior to June 1995, Chariot owned 92% of ESP. (D.I. 53 at 2).

8. Defendant B.F. Rich Co., Inc. ("BFR") is a Delaware corporation solely owned by ESP. (D.I. 53 at 2).

9. Defendant Hallowell Industries, Inc. ("Hallowell") is a Delaware Corporation for which Gray is the Chairman of the Board. (D.I. 1 at 4, D.I. 28 at 3, D.I. 47, Ex. E).

10. In 1994, Chariot retained the Canadian Imperial Bank of Commerce ("CIBC"), an investment banking firm, to assist Chariot in either raising debt financing for ESP and BFR or to consider selling the companies. (D.I. 47 at 2). CIBC was not successful. (D.I. 47 at 3).

11. Following CIBC's failure, Chariot consulted with Houlihan, Lokey, Howard, & Zukin ("Houlihan"), a national investment banking firm, to develop a corporate restructuring plan which would increase shareholder liquidity. (D.I. 47 at 4).

12. On June 30, 1995, Chariot sold its shares of ESP under a written agreement between Chariot and HomeStar Acquisitions Corp. ("HomeStar"), the nominee of Harcar, Inc. ("Harcar") ("Agreement"). (D.I. 47 at 6). Gray signed the Agreement as the Chairman of both Chariot and HomeStar. (D.I. 47, Ex. E). The Agreement provided that all of the ESP stock owned by Chariot, approximately 92% of the total shares, would be transferred to HomeStar, a subsidiary of Harcar, in return for a $15 million promissory note from Hallowell Industries ("Hallowell Note"). (D.I. 47 at 6, Ex. E, H). Gray signed the Hallowell Note as the Chairman of the Board. (D.I. 47, Ex. H).

13. Harcar, VDC Recovery Corp., and Chariot Investor's Inc., three affiliated companies, gave written undertakings, signed by Gray as the sole director, to pay the Hallowell Note if Hallowell could not do so without help. (D.I. 47 at I, J, K). The undertakings included commitments to sell the ESP shares if necessary to generate the funds to pay the Hallowell Note. (D.I. 47, Ex. I, J, K).

14. On June 30, 1995, the Board of Directors of Chariot, Gray being the sole director, approved the sale of Chariot's ESP shares. (D.I. 47 at 10). Additionally, Gray, as Chairman of Plastics, the majority shareholder of Chariot, also approved the sale of the ESP shares. (D.I. 47 at 10).

15. Approval of the ESP Transfer was not submitted to the Chariot shareholders for a vote. (D.I. 28 at 4).

16. Following the ESP Transfer, HomeStar merged with ESP, leaving ESP as the surviving corporation. (D.I. 47 at 10).

17. On August 7, 1995, Chariot was merged into Summit Metals. (D.I. 1 at 2, D.I. 28 at 2).

STANDARD OF REVIEW

1. In pertinent part, Rule 56(c) of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment if a court determines from its examination of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

2. In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. Valhal Corp. v. Sullivan Assocs., Inc., 44 F.3d 195, 200 (3d Cir. 1995). However, a court should not make credibility determinations or weigh the evidence. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

3. To defeat a motion for summary judgment, the non-moving party must:

> do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial."

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). However, the mere existence of some evidence in support of the nonmovant will not be sufficient to support a denial

of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the nonmovant on that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2510 (1986).

PARTIES' CONTENTIONS

1. In its First Cause of Action, asserted against Defendants Gray, ESP, BFR, Harcar, Hallowell, Plastics, and Holdings, Summit Metals seeks an order rescinding the ESP Transfer and imposing a constructive trust on all payments, fees, and distributions from ESP subsequent to the Transfer. (D.I. 1 at ¶ 102).

2. In support of the instant motion, Summit Metals contends that the ESP Transfer is void pursuant to 8 Del. C. § 144 because it was a self-dealing transaction which was neither approved by the vote of disinterested directors and/or shareholders, nor was the transaction fair. (D.I. 5 at 5).

3. Further, Summit Metals contends that the ESP Transfer constituted "unfair self-dealing, waste, misappropriation of corporate assets, and breach of fiduciary duty owed by Gray, as sole director and ultimate controlling shareholder of Chariot, and by Holdings and Plastics, as controlling shareholders of Chariot, to Chariot and its successor Summit." (D.I. 1 at ¶ 98).

4. Summit Metals contends that the ESP Transfer was a self-dealing transaction because Gray was the chairman and sole director of Chariot, HomeStar, and Hallowell and Gray signed the contract of

sale of ESP as chairman of both the buyer (HomeStar) and the seller (Chariot). (D.I. 5 at 7).

5. Summit Metals contends that the $15 million price paid for ESP was not fair because ESP was allegedly worth more than $15 million and the Hallowell Note was not in fact worth $15 million. Prior to the Transfer, Summit Metals contends that ESP had been valued in excess of $20 million by CIBC and that a written offer to purchase ESP for $17 million had been received and rejected. (D.I. 7, Ex. 19). Summit Metals also relies on the October 5, 1995 report of the independent accounting firm of Clifton, Gunderson & Co ("Clifton"), retained on behalf of ESP, projecting that by 1998 ESP would have "sales of $31,410,000, gross profits of $9,255,000, and net income of $1,562,000" as evidence that ESP was worth more than the price paid by HomeStar. (D.I. 7, Ex. 16). Further, Summit Metals contends that the Hallowell Note is worthless because it was unsecured and Hallowell is a shell company without assets or income. (D.I. 7 at 10). As of the filing of the instant motion, Summit Metals asserts that Hallowell has not made the payments due on the Note. (D.I. 5 at 9).

6. Summit Metals contends that the ESP Transfer was not a product of fair dealing because there was no indication that an independent negotiating committee was appointed to represent Chariot's interest, no advice or fairness opinion was obtained from outside financial advisors, no competing bids were solicited for ESP,

and the public shareholders of ESP were not entitled to vote on the transaction. (D.I. 5 at 11-12).

7. In sum, Summit Metals contends that the ESP Transfer was not at a fair price and was not the product of fair dealing, and therefore, the transaction is void and should be rescinded. (D.I. 5 at 2).

8. In opposition, Defendants contend that there are eight issues of material fact in dispute which preclude a grant of summary on the First Cause of Action. Defendants contend that the following factual issues are material and disputed:

(1) What was the value of 92% of ESP's shares as of June 30, 1995, when they were sold?

Defendants contend that the only fair market valuation of ESP before the Court is that of Clifton, which valued the shares of ESP at $12.6 million as of December 31, 1994. (D.I. 47, Ex. G). Specifically, Defendants contend that the valuation of CIBC, referenced by Summit Metals, is irrelevant because CIBC admitted that it "has not made an independent appraisal" of ESP. (D.I. 47, Ex. B). Defendants ultimately contend that expert testimony is required to resolve this issue of the value of 92% of ESP's shares as of the Transfer. (D.I. 45 at 2).

(2) What was the value of the $15 million Hallowell Note on June 30, 1995?

(3) What was the value of Harcar, Inc.'s written "commitment," "agreement," and "undertaking" on June 30, 1995 that it would pay the Hallowell Note if Hallowell were not able to do so?

(4) What was the value of VDC Recovery Corp's written "commitment," "agreement," and "undertaking" on June 30, 1995 that it would pay the Hallowell Note if Hallowell were not able to do so?

(5) What was the value of Chariot Investors, Inc.'s written "commitment," "agreement," and "undertaking" on June 30, 1995 that it would pay the Hallowell Note if Hallowell were not able to do so?

Defendants contend that the purchase price of ESP can only be determined after valuing the Hallowell Note, with a face value of $15 million, in conjunction with the written commitments by Harcar, VDC Recovery Corp., and Chariot Investor's Inc. (D.I. 45 at 2-3).

(6) What was the value of the financing of the Hallowell Note offered by the First National Bank of Maryland?

Defendants contend that the financing proposal received from First National Bank of Maryland to facilitate the corporate restructuring also added value to the Hallowell Note and should be considered when evaluating the consideration given for ESP. (D.I. 45 at 4).

(7) Was it fair to Chariot Group to sell the shares of ESP through a process (a) first attempting to have the investment banking arm of Canadian Imperial Bank of Commerce sell ESP for the price plaintiff now urges; (b) seeing that such a sale could not be made

after months of effort; and then (c) arranging a sale at a premium above the reasonable value of ESP to an affiliated company?

As evidence of fair dealing, Defendants point to the retention of CIBC to obtain either debt financing or sell ESP. (D.I. 45 at 4). Further, Defendants submit the affidavit of Richard Gray outlining a business plan developed with Houlihan to increase shareholder liquidity and combine ESP with other companies in a corporate structure that would be an attractive loan prospect. (D.I. 47).

As evidence of fair price, Defendants rely on the October 5, 1995 report of Clifton, retained on behalf of ESP, appraising the fair market value of ESP as of December 31, 1994 at $12.6 million. (D.I. 47, Ex. G). Defendants also rely on the Affidavit of Richard Gray outlining how the price for the ESP shares was calculated and designed to be fair to Chariot and all its shareholders. (D.I. 47).

(8) How could rescission return all parties to the status quo of 1995 when it would cause events of default in loan agreements and other adverse consequences for ESP and other defendants? (D.I. 50 at 2-6).

9. In answer to Defendants above assertion of eight factual disputes, Summit Metals contends that there are no disputed issues of material fact which would preclude entry of summary judgment. (D.I. 65 at 4). Summit Metals specifically replies to Defendants eight issues as follows:

(1) - (2) Summit Metals contends that the specific value of 92% of ESP's shares and the Hallowell Note are not relevant; only

the fact that there was a significant discrepancy between the value of the shares and the Note is relevant. Because of the alleged discrepancy, Summit Metals contends that it is clear that Chariot did not receive the best price reasonably available. (D.I. 65 at 4).

(3) - (5) Summit Metals contends that Defendants failed to establish that the guarantees added any value to the Hallowell Note because they failed to submit evidence regarding the financial resources of the guarantor companies. (D.I. 65 at 4). Further, Summit Metals contends that the guarantees are not relevant because the board resolutions are not legally enforceable obligations. (D.I. 65 at 4).

(6) Summit Metals contends that the financing offered by First National Bank of Maryland did not enhance the value of the Hallowell Note and is not relevant because the financing was never consummated. (D.I. 65 at 5).

(7) Summit Metals contends that the sale of ESP was not conducted fairly because an independent fiduciary did not make the relevant decisions and negotiate on Chariot's behalf. (D.I. 65 at 5).

(8) Summit Metals contends that it is not impracticable to restore the status quo. (D.I. 65 at 5). Further, Summit Metals contends that a change in control of ESP will not trigger a default under ESP's loan agreement with Fleet Bank because ESP will continue to be controlled by a "Gray" entity. (D.I. 65 at 5).

DISCUSSION

1. Under Delaware law, the director of a corporation owes a duty of loyalty to his or her company; such a duty "mandates that the best interest of the corporation and its shareholders take precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993).

2. In Delaware, typically, a self-dealing transaction involves "either a director appearing on both sides of a transaction or a director receiving a personal benefit from a transaction not received by the shareholders generally." Id.

3. When directors of a Delaware corporation engage in a self-dealing transaction, the directors must "demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain." Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983).

4. The Delaware courts have defined fairness as having two components: fair dealing and fair price. Id. at 711. Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." Id. Fair price "relates to the economic and financial considerations ... including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock." Id.

5. In addition to the common law fiduciary principles outlined, Delaware has enacted 8 Del. C. § 144 which provides:

> § 144. Interested directors; quorum
> (a) No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because any such director's or officer's votes are counted for such purpose, if:
> ...
> (3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee or the shareholders.

8 Del. C. § 144 (2000).

6. In the instant case, the parties do not dispute that Gray "had interests connected with both the seller and the buyer of the ESP shares." (D.I. 45 at 20). However, under Delaware law, specifically 8 Del. C. § 144, this fact alone will not support a challenge to the transaction. Under common law fiduciary principles, the Court must examine the fairness of the ESP Transfer to determine if the transaction is void or voidable.

7. After considering the parties contentions and the applicable law, the Court finds that genuine issues of material fact exist regarding the fairness of the ESP Transfer. With regard to the fair dealing aspect of the ESP Transfer, the Court cannot conclude, as Summit Metals contends, that the absence of an independent decision maker renders the ESP Transfer unfair per se. A reasonable jury could conclude that Gray's efforts to market ESP through CIBC, the

corporate restructuring plan developed with Houlihan, and the valuation of ESP by an independent accounting firm along with a purchase price in excess of the valuation, constituted a course of fair dealing.

8. Similarly, the Court finds that genuine issues of material fact exist with regard to the fairness of the price of the ESP Transfer which preclude summary judgment. For example, a genuine issue of material fact exists with regard to (a) the value of 92% of ESP's shares as of June 30, 1995; (b) the value of the $15 million Hallowell Note on June 30, 1995; (c) the value of Harcar, Inc.'s written "commitment," "agreement," and "undertaking" on June 30, 1995 that it would pay the Hallowell Note if Hallowell were not able to do so; (d) the value of VDC Recovery Corp's written "commitment," "agreement," and "undertaking" on June 30, 1995 that it would pay the Hallowell Note if Hallowell were not able to do so; (e) the value of Chariot Investors, Inc.'s written "commitment," "agreement," and "undertaking" on June 30, 1995 that it would pay the Hallowell Note if Hallowell were not able to do so; and (f) the value of the financing of the Hallowell Note offered by the First National Bank of Maryland. These factual questions cannot be resolved before full discovery and trial and without the assistance of expert opinions.

9. Because the Court concludes that genuine issues of material fact exist, the Court will leave the question of the appropriateness of rescission as a remedy for consideration at a later date.

10. For the reasons discussed, the Court will deny Plaintiff's Motion For Summary Judgment on its First Cause of Action. (D.I. 2, Adversary Proceeding No. 99-557 D.I. 4). An appropriate Order will follow.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SUMMIT METALS, INC.,	:	
Plaintiff,	:	Civil Action No. 00-387-JJF
v.	:	
RICHARD E. GRAY, et al.,	:	
Defendants.	:	

At Wilmington, this 20th day of August 2002, for the reasons discussed in the Court's Memorandum Opinion issued this day, IT IS HEREBY ORDERED THAT Summit Metals Motion For Partial Summary Judgment (D.I. 2, Adversary Proceeding 99-557 D.I. 4) is **DENIED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE